INDEX

Subject Index

	Page
Motion of intervening railroads to affirm	1
The questions presented	2
Statement of the facts	3
The authority of the Interstate Commerce Commission to raise intrastate rates and the principles which govern the exercise of that authority are well settled	7
The Commission's findings	8
The attack upon the findings that the rates on coal resulted in unjust discrimination against interstate commerce and should be increased	11
The rates on coal	12
The cost evidence	14
The findings said to have been necessary	16
The burden of proof	18
The attack upon the finding of persons-localities preference and prejudice with respect to coal	10
The attack upon the findings with respect to pulpwood	20
Conclusion	23
Appendix "A"—Pertinent Sections of the Interstate Commerce Act	25

Table of Cases Cited

Alabama v. *United States*, 283 U. S. 776	7
Alabama Great Southern Railway Company v. *United States*, 340 U. S. 216	16
Anderson Brothers and Foster v. *Alabama Central Railroad Company*, 206 I. C. C. 175	13
Carolina Coal Consumers Conference v. *A. and R. Railroad Company*, 270 I. C. C. 291	13
Class Rate Investigation, 1939, 262 I. C. C. 447	22
Florida v. *United States*, 282 U. S. 194	7

Page

Florida v. *United States*, 292 U. S. 1 ..... 7, 22
Georgia Public Service Commission v. *United States*, 283 U. S. 765 ..... 7, 19
Illinois Commerce Commission v. *United States*, 292 U. S. 474 7
Increased Freight Rates, 1947, 269 I. C. C. 33, 270 I. C. C. 81 4
Increased Freight Rates, 1947, 270 I. C. C. 403 2
Increased Freight Rates, 1948, 272 I. C. C. 695, 276 I. C. C. 9 ..... 2, 4, 5
Increased Freight Rates, 1951, 284 I. C. C. 589 2
Increased Railway Rates, Fares and Charges, 1946, 266 I. C. C. 537 2
Increases in Intrastate Rates, 186 I. C. C. 615 11
King v. *United States*, 344 U. S. 254 ..... 2, 7
Louisiana Public Service Commission v. *Texas and N. O. Railroad Company*, 284 U. S. 125 20
New York v. *United States*, 257 U. S. 591 7
North Carolina v. *United States*, 325 U. S. 507 7
Ohio v. *United States*, 292 U. S. 498 7
Pulpwood, North Carolina and Virginia to Cypress, Virginia, 235 I. C. C. 11 22
Seaboard Air Line Railroad Company v. *Watson*, 287 U. S. 86 2
Tennessee Intrastate Rates and Charges, 286 I. C. C. 41 2
United States v. *Louisiana*, 290 U. S. 70 7
Wisconsin Railroad Commission v. *C., B. and Q. Railroad Company*, 257 U. S. 563 7

STATUTES AND OTHER AUTHORITIES CITED

Administrative Procedure Act:

Sections 7(c) and 8 (5 U. S. C., Sections 1006(c) and 1007) 3
Section 8(b) 17
General Rules of Practice of the Interstate Commerce Commission, Rule 91(e) 17

	Page
Interstate Commerce Act:	
Section 4(1) (49 U. S. C., Section 4(1))	19
Sections 13(3(4) and 15a(2) (49 U. S. C., Sections 13(3)(4) and 15a(2))	1, 5, 7
Tennessee Statutes, Section 5419	19
Transportation Act of 1920	7
United States Code, Title 28:	
Section 1253	2
Section 2101(b)	2
Section 2284	2
Section 2385	2

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 393

STATE OF TENNESSEE, ET AL.,

vs.

UNITED STATES OF AMERICA, ET AL.

MOTION OF INTERVENING RAILROADS TO AFFIRM

Pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court, the intervening railroads, appellees, move that the judgment of the District Court be affirmed.

The judgment appealed from denied a petition to set aside an order of the Interstate Commerce Commission, entered by virtue of the powers conferred upon it by Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act (49 U. S. C., Sections 13(3)(4) and 15a(2)),[1] requiring the railroads in Tennessee to increase their intrastate freight rates on coal and wood by the full amounts of the Ex Parte

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[1] These sections of the Interstate Commerce Act and the National Transportation Policy, which is a part of said Act, are copied in Appendix A to this motion.

Nos. 166 and 168 increases.[2] The order was entered August 19, 1952, in a proceeding entitled "No. 30720, *Tennessee Intrastate Rates and Charges*", 286 I. C. C. 41. The case presented by this appeal is on "all-fours" with *King* v. *United States*, 344 U. S. 254, decided December 22, 1952, in which the Court upheld an order of the Commission requiring the railroads in Florida to increase their intrastate freight rates by the full amounts of the Ex Parte Nos. 162 and 166 increases.

The case was decided by a specially constituted three-judge United States District Court convened pursuant to 28 U. S. C., Sections 2284 and 2385, whose decision was unanimous. Final judgment was entered July 31, 1953 and a direct appeal to the Supreme Court was allowed September 2, 1953. Such an appeal is authorized by 28 U. S. C., Sections 1253 and 2101(b).

The Questions Presented

Appellants have assigned 27 alleged errors,[3] but actually make only two basic contentions. These are the usual contentions:

1. That the Commission's order is not supported by adequate findings; and

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[2] Ex Parte Nos. 162, 166 and 168 were proceedings in which the Commission authorized general increases throughout the United States in railroad freight rates and charges. The titles and citations of the proceedings are: Ex Parte No. 162, *Increased Railway Rates, Fares and Charges, 1946*, 266 I. C. C. 537; Ex Parte No. 166, *Increased Freight Rates, 1947*, 270 I. C. C. 403; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9. A later general increase was also authorized in Ex Parte No. 175, *Increased Freight Rates, 1951*, 284 I. C. C. 589, and mimeographed report dated August 10, 1953.

[3] Assignments of Error numbered 1 and 3 to 17, inclusive, do not comply with Rule 9 of the Revised Rules of the Supreme Court. They are so general that they do not raise any specific issues. See *Seaboard Air Line R. Co.* v. *Watson*, 287 U. S. 86, 91.

2. That the findings are not supported by the evidence.

In the statement of "Questions Presented", appellants have framed some of the questions, particularly questions 1 to 4, inclusive, on the supposition that the evidence shows what they contend it shows and does not support the Commission's findings. But, of course, before any such questions are reached it must be concluded that the Commission's findings are unsupported. Assignments of Error 18 and 22, which assert the failure of the Commission to comply with Sections 7(c) and 8 of the Administrative Procedure Act (5 U. S. C., Sections 1006(c) and 1007), are wholly unsubstantial.

Statement of the Facts

Since 1946, the Commission has authorized four general increases in railroad freight rates and charges throughout the United States. These increases were authorized under the authority conferred upon the Commission by Section 15a(2) of the Interstate Commerce Act and in consonance with the National Transportation Policy. The purpose of the increases was to enable the railroads to obtain revenue sufficient to enable them to render adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service, and to develop, coordinate, and preserve a national transportation system "adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."[4] The necessity for the increases arose because of the great and continuing increase in the cost of railway materials and

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[4] Statements substantiating what has just been said will be found in the Commission's reports: Ex Parte No. 162, 266 I. C. C. 537, at 614; Ex Parte No. 166, 269 I. C. C. 33, at 53; Ex Parte No. 168, 276 I. C. C. 9, at 111; Ex Parte No. 175, 284 I. C. C. 589, at 660-661.

supplies, in the wages of railway employees, and in taxes, as well as the continued unprofitableness of passenger operations. Ex parte No. 166, *Increased Freight Rates, 1947*, 269 I. C. C. 33, 53, 270 I. C. C. 81, 87-89; Ex Parte No. 168, *Increased Freight Rates, 1948*, 276 I. C. C. 9, 32-41.

All the increased expenses which made increases in interstate freight rates and charges necessary were also incurred on intrastate traffic. This was pointed out in the report involved herein. *Tennessee Intrastate Rates and Charges, supra.* The Commission there stated (p. 58):

> "The need of the railroads for additional revenue to meet increased expenses was the underlying basis for the increases authorized by us in Ex Parte Nos. 166 and 168, and the increased expenses were not confined to interstate traffic, but were and are incurred also on intrastate traffic, including that in Tennessee."

The reports in the proceedings in which general increases were authorized plainly show that the Commission contemplated that said increases should be applied to intrastate as well as interstate rates. Referring specifically to the Ex Parte No. 166 increases, the Court stated in *King* v. *United States, supra,* at pages 257-258, that:

> "The Commission's estimates of revenue contemplated the application of the increased rates to intrastate, as well as to interstate transportation. The report concludes with the statement that the 'Committee of Cooperating State Commissioners . . . authorize us to state that they concur in the foregoing report.' 270 I.C.C. 403, 463."

Likewise, in Ex Parte No. 168 the Commission "invited the cooperation of State regulatory bodies, as obviously State-made rules would be involved", and included intrastate revenues and expenses in determining the amounts

of the increases it authorized. *Increased Freight Rates, 1948*, 272 I.C.C. 695, 700, 708-712; 276 I.C.C. 9, 13, 18-24, 113.

After the Interstate Commerce Commission authorized the Ex Parte No. 166 increases in interstate freight rates and charges, the railroads operating in Tennessee petitioned the Tennessee Commission to authorize the same increases in the intrastate freight rates and charges in that State. That Commission, however, refused to authorize the full amounts of these increases in the rates on many important commodities. Following the Interstate Commerce Commission's final decision in Ex Parte No. 168, the Tennessee Commission authorized a general increase of 10 percent, the same as authorized interstate. But it again refused to authorize the full amounts of the Ex Parte No. 166 increases on the commodities theretofore excepted, and made the 10-percent increase subject to further and additional exceptions.[5]

After the decisions of the Tennessee Commission, the railroads operating in that State filed a petition with the Interstate Commerce Commission, requesting it to institute an investigation under Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act to determine whether or not the action of the Tennessee Commission resulted in discrimination against interstate commerce or persons-localities preference and prejudice. Such an investigation was instituted, a hearing was held before an examiner, briefs were

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[5] The efforts of the railroads to obtain the authority of the Tennessee Commission to increase their intrastate rates by the full amounts of the Ex Parte Nos. 166 and 168 increases are outlined in the Interstate Commerce Commission's report in *Tennessee Intrastate Rates and Charges*, *supra*, at pages 42-43. The commodities upon which the Tennessee Commission refused to authorize the full amounts of said increases, and a comparison between the amounts it authorized and the amounts authorized by the Interstate Commerce Commission, are shown in Appendix A to said report.

filed, and the examiner issued a proposed report in which he recommended that the intrastate rates be increased to the same extent as the interstate rates on certain of the involved commodities and not on others. Following the filing of exceptions and replies thereto, the case was argued before the entire Commission. Before the argument, the Tennessee Commission authorized the full amounts of the Ex Parte Nos. 166 and 168 increases on the commodities as to which the examiner had recommended such increases, and these commodities were not included in the Interstate Commerce Commission's report and order.[6]

The Interstate Commerce Commission adopted the examiner's proposals, except with respect to the rates on coal and wood. It found that the failure to increase the intrastate rates on coal, except those to Nashville, Old Hickory and intermediate points, by the full amounts of the Ex Parte Nos. 166 and 168 increases, resulted in both unjust discrimination against interstate commerce and persons-localities preference and prejudice; and that the failure to increase the rates on wood by these amounts resulted in unjust discrimination against interstate commerce.[7] Petitions of appellants for reconsideration were denied and, after refusal of the Tennessee Commission to authorize the increases, the Interstate Commerce Commission issued an order requiring the railroads to make said increases.[8] This is the order upheld by the unanimous decision of the three-judge District Court.

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[6] *Tennessee Intrastate Rates and Charges, supra,* at page 43.

[7] Findings Nos. 4 and 5.

[8] Order of August 19, 1952, in Appendix B to appellants' Statement As To Jurisdiction.

***The Authority of the Interstate Commerce Commission to* Raise Intrastate Rates and the Principles Which Govern The Exercise of That Authority Are Well Settled.**

Sections 13(3)(4) and 15a(2) of the Interstate Commerce Act were parts of the Transportation Act of 1920.[9] Since that time numerous decisions of the Court have made plain the Commission's authority and duty under these sections, as well as the principles which govern the exercise of that authority. Among said decisions are the following:

Wisconsin R. R. Comm. v. *C., B. & Q. R. Co.*, 257 U. S. 563;
New York v. *U. S.*, 257 U. S. 591;
U. S. v. *Louisiana*, 290 U. S. 70;
Alabama v. *U. S.*, 283 U. S. 776;
Georgia Pub. Serv. Comm. v. *U. S.*, 283 U. S. 765;
Ohio v. *United States*, 292 U. S. 498;
Illinois Comm. Com. v. *U. S.*, 292 U. S. 474;
Florida v. *U. S.*, 282 U. S. 194;
Florida v. *U. S.*, 292 U. S. 1;
North Carolina v. *U. S.*, 325 U. S. 507;
King v. *United States*, 344 U. S. 254.

These decisions establish two propositions which are especially pertinent in the instant case. They are:

1. The authority granted the Commission over intrastate rates is to be considered in the light of its affirmative duty to fix rates and to take other important steps to maintain an adequate national railway system; and

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[9] Section 15a has been changed since its enactment in 1920, but the changes emphasize the duty of the Commission to prescribe rates which will give carriers adequate revenue. *Florida* v. *United States*, 292 U. S. 1, 6-8.

2. The Court will examine the findings of the Commission to determine whether they are adequate to support its order, and will examine the evidence to the extent necessary to determine whether the findings are supported by substantial evidence on the record as a whole; but the Court will not substitute its judgment for the judgment of the Commission.

The Commission's Findings

The District Court made 15 findings of fact and 4 conclusions of law. The first 8 findings of fact are largely prelude; the last 7 contain the findings of the Commission and references to the evidence which supports them. The latter findings, together with the District Court's references to the evidence supporting those findings, are:

> "The Court adopts the following findings of the Interstate Commerce Commission, all of which findings are supported by substantial evidence:
>
> "9. '1. The conditions incident to the intrastate transportation of freight in Tennessee are not more favorable than those incident to the interstate transportation of freight between points in Tennessee and between Tennessee, on the one hand, and the adjoining States in southern territory, on the other.'
>
> "This finding of the Commission is supported by the evidence (Tr. 32-56), and by many previous decisions of the Commission, among which are, Southern Class Rate Investigation, 100 I.C.C. 513, 623; Southern Cement Rates, 132 I.C.C. 427, 455; Sand, Gravel, Slag, Stone and Chert, 165 I.C.C. 731; Increases in Tennessee Freight Rates and Charges, 272 I.C.C. 625, 646.
>
> "10. '2. The amounts and percentages by which interstate freight rates and charges between points in Tennessee and points in adjoining States were in-

creased, as authorized in Ex Parte Nos. 166 and 168, are just and reasonable.'

"Finding No. 2 is substantially the same as the finding made in Ex Parte No. 166, Increased Freight Rates, 1947, 270 I.C.C. 403, 456 and Ex Parte No. 168, Increased Freight Rates, 1948, 276 I.C.C. 9, 113.

"11. '3. As to coal, there is active competition between persons and localities engaged in interstate commerce between points in Tennessee and points in other States, on the one hand, and persons and localities engaged in intrastate commerce in Tennessee, on the other.'

"The above finding is supported by the evidence cited on pages 47-55, inclusive, of the Commission's report in this case. The references to the pages of the transcript where the evidence will be found are shown in Appendix C to the Brief of the I.C.C., pages 11-14, 18-22, 23-29, 38-42.

"12. '4. The intrastate rates and charges in Tennessee on chemical, acid, pulp, and fuel wood and on coal, except to Nashville and Old Hickory and intermediate points taking the same rates, are not contributing their fair share of the revenues required by the respondents to enable them to render adequate and efficient service and to operate profitably; are causing undue, unreasonable, and unjust discrimination against interstate commerce; and as to coal, with the exception noted, are causing undue preference of and advantage to persons and localities in intrastate commerce, and undue prejudice and disadvantage to persons and localities in interstate commerce.'

"Finding No. 4 is supported by Findings Nos. 1, 2, 3, and 6 and by evidence showing the railroads' need for additional revenue, which evidence is summarized in the Commission's report (286 I.C.C. 45-46, 58, and Appendix B) and will be found in the record, Tr. 330-403.

"13. '5. The unjust discrimination and undue preference herein found to exist should be removed by applying to the Tennessee intrastate rates and charges on the commodities described in finding 4 the same respective increases as authorized thereon in Ex Parte Nos. 166 and 168 which are and for the future may be maintained by the respondents on like interstate traffic between points in Tennessee and points in adjoining southern States; provided that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points.'

"Finding No. 5 like Finding No. 4 is an ultimate finding, and is supported by all other subsidiary findings and is an exercise by the Commission of its statutory power to eliminate the unjust discrimination against interstate commerce and the undue preference and prejudice as between persons and localities found to exist.

"14. '6. The establishment of increases in intrastate rates and charges as provided in finding 5 will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues.'

"Finding No. 6 is supported by the evidence, 286 I.C.C. 44-45, 55, 58-59; Tr. 8-9, 114-115, 134-135, 167, 175, and 205. The amount of the revenue the railroads will receive from the increases ordered in the intrastate rates on coal and wood was estimated at approximately $135,000 per year (286 I.C.C. 44).

"15. '7. The assailed rates and charges, except as appears from the foregoing findings with respect to coal and wood, are not shown to cause undue or unreasonable advantage, preference, or prejudice, or

to cause undue, unreasonable, or unjust discrimination against interstate commerce.'

"The findings of the Commission also included a saving clause reading as follows:

'These findings and conclusions are without prejudice to the right of the authorities of the State of Tennessee, or any other interested party, to apply for a modification thereof as to any specific intrastate rate or charge affected thereby on the ground that such rate or charge is not related to the interstate rates or charges on like traffic in such a way as to contravene the provisions of the Interstate Commerce Act.'

"The Court finds that the findings of the Commission are supported by substantial evidence on the record as a whole."

A comparison of the above findings with the findings held adequate in *King* v. *United States, supra,* note 13, makes it clear that the order herein assailed is supported by adequate findings. The adequacy of these findings is also made plain by a comparison of them with the findings held adequate in *United States* v. *Louisiana, supra.* The findings there upheld were made in *Increases in Intrastate Freight Rates,* 186 I.C.C. 615, and appear at pages 642-643.

The Attack upon the Findings That the Rates on Coal Resulted in Unjust Discrimination Against Interstate Commerce and Should Be Increased.

Appellants assert that the Tennessee intrastate rates on coal, without the Ex Parte Nos. 166 and 168 increases, are already as high as the interstate rates with said increases and are contributing more to the railroads' revenues. Consequently, they argue that the District Court should have concluded that the Commission had no authority to require

the intrastate rates to be increased; that its Findings Nos. 4-6 are not supported by adequate subsidiary findings, or by the evidence, and that its order is invalid. They say that it was necessary for the Commission to find, and for the evidence to show, that the intrastate rates ordered increased were lower and contributed less to the carriers' revenues than the interstate rates which had already been increased (Assignments of Error, Nos. 2, 19, 20 and 21).

These contentions can best be answered by an examination of the rates on coal and a brief consideration of the cost evidence.

The Rates On Coal

Since 1925, the railroads have followed the policy of maintaining interstate and intrastate rates on the same level, the exceptions in Tennessee being due to the refusal of the State Commission to permit the intrastate rates to be increased to the same extent as the interstate rates (286 I. C. C. 54). The coal rate adjustment in the South and in Tennessee is of long standing. It is a group and differential adjustment as contrasted with a mileage adjustment, although a mileage scale is generally used in arriving at the rates from the base groups. Stated another way, coal mines are grouped and the same rate applies from all mines in a group to a given destination. The rates from the base group are usually on a mileage basis and the rates from the other groups are related to those from the base group. The result, as the Commission states, is "an extensive rate structure based on differential rates from the various competing groups of mines to common markets" (286 I. C. C. 48).

The following tabulation, compiled from the Commission's report and exhibits of record, shows four typical examples, referred to by the Commission, of the disruption of the relationship of the rates from competing interstate

and intrastate groups which was brought about by the refusal of the Tennessee Commission to authorize the full amounts of the Ex Parte Nos. 166 and 168 increases. The disruption today is greater than that shown under "Present Differential", as the Tennessee Commission has also refused to authorize any part of the Ex Parte No. 175 increases on coal or pulpwood. All of the destinations shown are in Tennessee.

From	To	Present Rates	Normal Differential	Present Differential
Jellico group	Chattanooga	$2.32–I*	none	+ 19¢ [1]
Jellico group	Chattanooga	$2.13–S*		
Western Ky.	Columbia	$2.75–I	none	+ 21¢ [2]
Tracy City	Columbia	$2.54–S		
Western Ky.	Memphis	$3.03–I	− 10¢	+ 6¢ [3]
Tracy City	Memphis	$2.97–S		
Harlan County	Lewisburg	$3.72–I	+$1.00	+$1.39 [4]
Tracy City	Lewisburg	$2.33–S		

* I denotes interstate rates; S denotes intrastate rates.
[1] Exhibit 17, page 11; 286 I.C.C. 55.
[2] Exhibit 36, page 2; 286 I.C.C. 49–50.
[3] Exhibit 36, page 1; 286 I.C.C. 49.
[4] Exhibit 51; 286 I.C.C. 50–51.

In Docket No. 25816, *Anderson Bros. & Foster* v. *Alabama Central R. Co.*, 206 I. C. C. 175, the Commission prescribed interstate rates on coal from mines in western Kentucky, northern Alabama and the Whitwell, Tennessee, group to destinations in Tennessee. And in Docket No. 29390, *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291, it prescribed rates from mines in Tennessee, Virginia and West Virginia to destinations in North and South Carolina and to Augusta, Ga. In the tabulation below we compare the intrastate rates required by the Tennessee Commission and those established under the assailed order of the Interstate Commerce Commission with the interstate rates prescribed in the two cases mentioned. All the rates shown, except those required by the Tennessee Commission, have been increased as authorized by Ex Parte Nos. 166 and 168. The origin, the Lake City group, is the base group

in eastern Tennessee, and a large volume of coal moves from said group and related groups to points in Tennessee and other states (Tr. 140;[10] Ex. 17, pp. 3-7a). The tabulation has been compiled from Exhibit 17, page 9.

From Lake City, Tenn. Group To	Miles	Intrastate Rates A	Intrastate Rates B	Interstate Rates C	Interstate Rates D
Aloca	50	179	196	244	224
Athens	90	200	218	270	251
Chattanooga	146	200	218	303	286
Cleveland	117	200	218	281	264
Dayton	81	200	218	270	251
Greeneville	109	193	210	281	264
Johnson City	141	213	232	303	286
Jonesboro	133	198	211	292	275
Lenoir City	59	190	218	244	224
Louden	64	190	218	257	238
Morristown	77	179	196	257	238

A. Rates required by order of the Tennessee Commission.
B. Rates established under order of Interstate Commerce Commission assailed herein.
C. Rates prescribed in Docket No. 29390, increased as authorized in Ex Parte Nos. 166 and 168.
D. Rates prescribed in Docket No. 25816, increased as authorized in Ex Parte Nos. 166 and 168.

These tabulations show that the Tennessee intrastate rates required by order of the Tennessee Commission and those established as a result of the assailed order of the Interstate Commerce Commission are both lower than interstate rates prescribed by the Interstate Commerce Commission. They completely refute appellants' contention with respect to the relative level of the interstate and intrastate rates. This contention is also refused by the rate comparisons in Exhibit 11.

The Cost Evidence

Appellants sought to show by cost evidence that the intrastate rates on coal, without the Ex Parte Nos. 166 and 168 increases, were more profitable to the railroads than the

[10] The reference "Tr." is to the transcript of testimony at the hearing before the Interstate Commerce Commission's examiner.

interstate rates with said increases. To make such a showing two things were essential: (1) to obtain representative interstate and intrastate rates; and (2) to establish the cost of handling *coal* moving under those rates. Appellants did neither.

Referring particularly to the rates used as the basis of the cost computations, the Commission stated (286 I. C. C. 54):

> "• • • the Tennessee Valley Authority relies upon computations based upon excerpts from the Carload Waybill Analyses, 1948, Statement No. 5032 and Statement No. 5028, issued in June 1950, by our Bureau of Transport Economics and Statistics. The computations were made by witnesses who could not give any of the shipping points covered by the statements or the transportation conditions or circumstances surrounding the movements or the establishment of the rates charged. The cost computations were also made in connection with excerpts from the waybill analyses statements. The traffic statistics included both intrastate and interstate movements. In the circumstances, the computations do not support conclusively these contentions."

The Commission's criticisms are valid. Their force is strengthened by the fact that much coal moves between points in Tennessee via interstate routes and is charged interstate rates, but such coal is considered as intrastate traffic in the Waybill Analyses, which, incidentally, include only 1 percent of the total shipments (286 I. C. C. 49-50, 55; Tr. 654, 686). Thus, the so-called average intrastate rate and the average intrastate haul, which are the very foundations of appellants' cost computations, are not intrastate at all (Tr. 688-689). Neither are the so-called average interstate rates and hauls actually interstate (Tr. 654).

While the Commission did not discuss the cost formula used by appellants, it may be pointed out that this formula

does not purport to show the actual cost of handling a particular commodity; it only purports to show the average cost of handling commodities in different types of equipment (Tr. 694-695). The so-called costs shown by appellants would apply equally whether the commodity transported was coal or sand and gravel (Tr. 687). Moreover, the costs shown take no account of the fact that coal originates in mountainous territory; that "many of the mines are served by short rail lines and branch lines of the larger rail carriers" (286 I. C. C. 47); and that the cost of handling intrastate shipments is greater than the cost of handling interstate shipments, as most of the latter move in through trains (Tr. 32-36, 47-48).

Obviously, the validity of cost evidence and the weight to be accorded it are primarily for the Commission to determine. Cost is by no means the controlling factor in rate making (*Alabama Great S. Ry. Co.* v. *United States*, 340 U. S. 216, 223, and Note 4), and it was stated in the *King Case, supra*, page 273, that:

> "'Where the conditions under which interstate and intrastate traffic move are found to be substantially the same with respect to all factors bearing on the reasonableness of the rate, and the two classes are shown to be intimately bound together, there is no occasion to deal with the reasonableness of the intrastate rates more specifically, or to separate intrastate and interstate costs and revenues. Compare *American Express Co.* v. *Caldwell*, 244 U. S. 617; *United States* v. *Louisiana, supra* [290 U. S. 70]; *Florida* v. *United States, ante* [292 U. S.], p. 1.' *Illinois Commerce Commission* v. *United States*, 292 U. S. 474, 483-484. See also, *Montana* v. *United States*, 106 F. Supp. 778, 783."

The Finding Said To Have Been Necessary

Appellants contend that a specific finding that "the intrastate rates on coal are on a lower level than the interstate

rates or are returning a lesser proportionate share of the revenues required by the rail carriers" was necessary because of and also independently of, Section 8(b) of the Administrative Procedure Act (Statement As To Jurisdiction, p. 11).

It should be pointed out that appellants' briefs before the Commission contained no request for specific findings,[11] and we do not think they are in any position to complain of the absence of the finding they now say was necessary. But, however that may be, there can be no doubt of the fact that the Commission concluded that the intrastate rates on coal were lower than the interstate rates and were not contributing their fair proportionate share of the railroads' revenues. Moreover, it expressed these conclusions by adequate findings.

The Commission found that the intrastate rates on coal "are not contributing their fair share of the revenues required by the respondents", and "are causing undue, unreasonable, and unjust discrimination against interstate commerce" (Finding 4); that the discrimination should be removed by applying to the intrastate rates on coal the same "increases as authorized thereon in Ex Parte Nos. 166 and 168" (Finding 5); and that the addition of said increases "will not result in unreasonable rates or charges, or rates and charges that are unreasonable in relation to interstate rates and charges, and will substantially increase the respondents' revenues" (Finding 6). These findings, together with Findings 1 and 2, also make it plain that the Commission concluded that the intrastate rates without the increases were abnormally low. The findings were manifestly sufficient.

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[11] Rule 91(e) of the Commission's General Rules of Practice provides:

"Requested findings.—Each brief should include such requests for specific findings, separately stated and numbered, as the party desires the Commission to make."

The Burden Of Proof

Seizing upon the Commission's statement (286 I.C.C. 54) that "In the circumstances [appellants' cost] computations do not support conclusively these contentions.", it is said that the Commission placed the burden of proof upon appellants, contrary to Section 7 (c) of the Administrative Procedure Act (Assignments of Error, Nos. 22 and 23). But the contention is disproved by statements following immediately the statement seized upon. Continuing, the Commission said (286 I.C.C. 54):

> "The evidence of record supports the conclusion that the respondents, after the decision of 1925 in the southern class rate investigation, adopted and have since followed the policy of maintaining intrastate rates throughout southern territory on the same relative level as intersate rates on practically all commodities. With respect to Tennessee, the exceptions are due to the action of the Tennessee commission in refusing to permit the intrastate rates on certain commodities to be increased to the full extent authorized in the interstate rates."

The Attack upon the Finding of Persons–Localities Preference and Prejudice with Respect to Coal

It is asserted that the finding that the intrastate rates on coal resulted in persons-localities preference and prejudice is not supported by subsidiary findings showing in detail "the particular rates causing the undue preference and prejudice and the shippers or localities * * * unduly prejudiced and disadvantaged", or by findings sufficient to support the conclusion that the preference and prejudice is so widespread as to justify a statewide order (Assignments of Error, Nos. 24 and 25).

We point out that the Commission's order should be sustained even if the finding of persons-localities preference

and prejudice is inadequate. *King* v. *United States, supra,* Note 14; *United States* v. *Louisiana, supra.* But we think the finding (No. 4) is entirely adequate, especially when considered, as it should be, in the light of Finding No. 3 and what was said in the Commission's report. *Georgia Public Service Comm.* v. *United States,* 283 U.S. 765, 771.

Coal, as the Court knows, is one of the most widely used of all commodities. The evidence summarized in the Commission's report shows that there are movements of coal from interstate and intrastate mines to destinations throughout the State of Tennessee (286 I.C.C. 47-51, 55). This evidence also shows that there is keen competition between the interstate and intrastate producers in the sale of coal in Tennessee, and the Commission so found (286 I.C.C. 47-51, 55; Finding No. 3). Thus, the evidence and Finding No. 3 sustain the ultimate finding of statewide persons-localities preference and prejudice.[12]

In *Georgia Public Service Comm.* v. *United States, supra,* the Court sustained an order of the Commission, under Section 13(4), based upon a finding that the intrastate rates on chert, clay, sand and gravel resulted in statewide persons-

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[12] On page 59 of its report the Commission stated "that some of the Tennessee intrastate rates unduly prefer certain shippers and localities in intrastate commerce to the undue disadvantage of and prejudice to other shippers and localities in interstate commerce." Much is sought to be made of the use of the words "some" and "certain". But these words were used solely for the purpose of making it clear that what was said did not include Nashville, Old Hickory, and intermediate points taking the same rates (Findings 4 and 5.) The railroads had reduced the interstate and intrastate rates to the named destinations on account of the severe competition of natural gas, and had reduced the rates to the intermediate points to comply with Section 4(1) of the Interstate Commerce Act (49 U.S.C., Section 4(1)) and Section 5419 of the Tennessee Statutes (286 I.C.C. 51-52). Competitive conditions frequently make it necessary to reduce rates to particular localities in the face of general increases (286 I. C. C. 58). With this exception, the Commission's finding of persons-localities preference and prejudice is statewide in scope; and it is supported by the evidence.

localities preference and prejudice. In its opinion the Court said (p. 774):

> "When an investigation involves shipments from and to many places under varying conditions, typical instances justify general findings. Railroad Commission v. Chicago, B. & Q. R. Co., 257 U. S. 563, 579, 66 L. ed. 371, 379, 22 A. L. R. 1086, 42 S. Ct. 232. Compare Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 83, ante, 221, 228, 51 S. Ct. 1. While the order relates only to a few commodities, the scales of rates are statewide in operation; and they apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief.

See, also, *Louisiana Public Service Comm.* v. *Texas and N. O. R. Co.*, 284 U.S. 125.

The Commission would be unable to exercise the powers conferred upon it by the persons-localities preference and prejudice provision of Section 13(4) if it were required to make the detailed findings appellants contend are necessary.

The Attack Upon the Findings With Respect to Pulpwood

The Commission found that the intrastate pulpwood rates of all except two of the Tennessee railroads resulted in unjust discrimination against interstate commerce and should be increased by the amounts authorized in Ex Parte Nos. 166 and 168 (Findings Nos. 4 and 5). But the finding directing the increases (No. 5) contains the proviso "that no intrastate rate or charge on pulpwood shall be increased so that it will exceed the lowest level of the corresponding interstate rates on pulpwood maintained by the same carrier to or from Tennessee points."

In order to have the same level of rates interstate and intrastate on pulpwood, certain railroads in the South in-

cluding two that operate in Tennessee, adopted a reduced uniform scale for application on that commodity. This scale results in rates lower than the interstate or Tennessee intrastate rates of other Tennessee lines. The lawfulness of the scale is being investigated by the Interstate Commerce Commission, but that Commission and the Tennessee Commission have permitted rates made by use of it to be established (286 I.C.C. 56, Note 4). The existence of these lower rates, which are not affected by the Interstate Commerce Commission's order herein, is the sole basis for appellants' attack upon the Commission's findings with respect to pulpwood.

Appellants allege that, before the Commission could require an increase in rates higher than those under the reduced uniform scale maintained by two Tennessee railroads, it was obliged to find that the operating conditions for pulpwood traffic on the railroads whose rates were required to be increased were less favorable, and their revenue needs greater, than those of the two lines with the lower rates (Assignment of Error, No. 26). They also allege that the existence of the lower rates negatives the Commission's finding of unjust discrimination against interstate commerce and brings about discrimination among Tennessee intrastate shippers on different railroads (Assignment of Error, No. 27).

The two railroads with the lower rates have the same level of rates interstate and intrastate. The Commission's order requires the other railroads in Tennessee to establish intrastate rates which will more nearly equal their interstate rates. Appellants say that the Commission cannot do this without a detailed investigation of the comparative operating conditions and revenue needs of the two railroads and all other railroads in Tennessee. This condition is not sound. If it were, general revenue cases such as the in-

stant case would be turned into complicated and protracted rate cases, and the administrative arm of the Commission would be paralyzed.[13] *King v. United States, supra,* page 275.

There is nothing in the Interstate Commerce Act which requires all railroads to maintain the same level of rates on a given commodity, and nothing in Section 13(4) which forbids the removal of unjust discrimination against interstate commerce when the rates necessary for that purpose are higher than the rates of some other railroads on the same commodity. On the contrary, that section forbids, and declares to be unlawful, unjust discrimination against interstate commerce caused by any rate made or imposed by state authority. It also requires the Commission to prescribe the rate necessary to remove such discrimination.

In *Florida* v. *United States,* 292 U.S. 1, the Court reviewed and upheld an order of the Commission, under Section 13(4), requiring a single railroad, the Atlantic Coast Line, to increase its Florida intrastate log rates for distances of 170 miles and less. The order was based upon a finding of unjust discrimination against interstate commerce. It was attacked on the ground, among others, that the rates required to be established were higher than the interstate and intrastate log rates of certain other carriers in southern territory (292 U.S. 4, 11).

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[13] There is no contention that the Tennessee intrastate rates, increased as required by the Commission's order, are unreasonable. But we point out that the pulpwood rates in the South and in Tennessee are based on the so-called Roanoke Rapids Scale, or scales closely approximating it (286 I.C.C. 56), and that the Commission has recognized that rates under that scale are depressed. *Pulpwood, North Carolina and Virginia to Cypress, Va.,* 235 I.C.C. 11, 13; *Class Rate Investigation,* 1939, 262 I.C.C. 447, 597-598. The Tennessee intrastate rates, after being increased as required, are still less than the interstate rates of the same railroads (286 I.C.C. 56).

The Tennessee intrastate rates on pulpwood were not on a uniform level at the time of the hearing before the Commission, but no contention was then made that the differences in these rates resulted in "discrimination among shippers on different railroads." The allegation that the increased rates required by the Commission result in such discrimination is a conclusion of counsel, not a statement of fact. Moreover, the saving clause in the Commission's findings and conclusions affords any injured party ample opportunity to secure relief if injustices should result from its order.

Conclusion

In the *King Case, supra,* the Court said (p. 272):

> "The Commission has applied to the Florida operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Florida along the same lines it followed when estimating the revenues available in the southern territory from intrastate as well as interstate operations. In the absence of any showing that it is not applicable to Florida, the evidence which forms the basis of the Commission's nationwide order becomes the natural basis for its Florida order."

The above statement applies with full force to what the Commission has done in the instant case. It has found, and the evidence shows, that the railroads in Tennessee need additional revenue (Finding 4; 286 I.C.C. 45-46 and Appendix B). It has applied to the Tennessee operations the same conclusion it reached as to the need for increased revenue on a national basis and has distributed the burden within Tennessee along the same lines it followed in estimating the revenues available in southern territory from interstate as well as intrastate operations. Its order simply reminds appellants that Tennessee is a part of the Union.

WHEREFORE, the premises considered, the intervening railroads pray that the judgment of the three-judge District Court be affirmed.

Respectfully submitted,

JAMES A. BISTLINE,
A. J. DIXON,
FRANK W. GWATHMEY,
M. T. HASTINGS,
EDWIN F. HUNT,
PRIME F. OSBORN,
WILLIAM H. SWIGGART,
CHARLES P. REYNOLDS,
Counsel for Intervening Railroads, Appellees.

APPENDIX "A"

Pertinent Sections of the Interstate Commerce Act

National Transportation Policy

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (49 U.S.C., preceding Section 1.)

Whenever in any investigation under the provisions of this part, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this part or part III with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State

bodies and of the Commission; and to that end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this part or part III. (49 U.S.C., Section 13(3).)

Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (49 U. S. C., Section 13(4).)

In the exercising of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U.S.C., Section 15a(2).)